No. 257

In the Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Federal Maritime Commission and the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 19, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. D, *infra*, pp. 129–132) is reported at 372 F. 2d 932. An earlier opinion of the court of appeals (App. B, *infra*, pp. 67–77) is reported at 351 F. 2d 756. The Commission's re-

port on remand (S.J.A. 3a–58a,[1] App. C, *infra*, pp. 78–127) is reported at 7 Pike & Fischer S.R.R. 457; it has not yet been officially reported. The Commission's first report (J.A. 451a–502a; App. A, *infra*, pp. 17–64) is reported at 7 F.M.C. 737.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, p. 133) was entered on January 19, 1967. On May 16, 1967, the Chief Justice extended the government's time for filing a petition for a writ of certiorari to June 18, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814, directs the Federal Maritime Commission to disapprove any agreement between carriers affecting competition that the Commission finds, *inter alia*, detrimental to the commerce of the United States or contrary to the public interest. In the present case, the Commission disapproved two provisions of passenger steamship conference agreements, one prohibiting travel agents handling conference business from selling passage on competing, non-conference lines (the so-called "tieing rule"), the other requiring unani-

[1] "J.A." refers to the Joint Appendix printed for the court below in connection with the first review. "S.J.A." refers to the Supplemental Joint Appendix printed in connection with the second review. By order of the court below (S.J.A. 122a), the Joint Appendix in the first review was deemed a part of the Joint Appendix in the second review.

mous action by conference members before the maximum rate of commissions payable to travel agents may be changed (the "unanimity rule"). The questions presented are:

1. Whether the Commission, upon finding that the tieing rule on its face was seriously anticompetitive and did not further a legitimate purpose, properly disapproved it as contrary to the public interest.

2. Whether the Commission, upon finding that the unanimity rule (a) impaired the ability of the conference members to compete with other modes of transportation, (b) impaired the flexibility of the conference in responding to changed circumstances, and (c) served no overriding public purpose, properly disapproved it.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, provides in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; con-

trolling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. * * *

* * * * *

Every agreement, modification, or cancellation lawful under this section * * * shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

STATEMENT

As the result of a complaint by the American Society of Travel Agents ("ASTA"), a trade association of travel agents, the Federal Maritime Commission in 1959 instituted its first comprehensive investigation since the enactment of the Shipping Act in 1916 of agreements and practices affecting the travel agents of two overlapping passenger steamship conferences—the Transatlantic Passenger Steamship Conference ("TAPC") and the Atlantic Passenger Steamship Conference ("APC"). The members of the two conferences (which include both foreign and domestic steamship companies) account for 99 percent of the transatlantic passenger steamship traffic. They obtain most of this traffic through the services of travel agents appointed by them, who booked 80 percent of all transatlantic ocean passage (exclusive of cruises) in 1960. In exchange for their services the travel agents receive commissions from the carriers.

After a full evidentiary hearing the Commission, pursuant to Section 15 of the Shipping Act, disapproved two provisions of the conference agreements (App. A, *infra*, pp. 64–65). One—the so-called "tieing rule"—prohibits travel agents who are authorized to book passage on conference lines from selling bookings on any competing non-conference line. The other requires a unanimous vote of the conference members before the maximum level of commissions paid travel agents may be changed (the "unanimity rule"). On review, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order

and remanded the case to the Commission for reconsideration (App. B, *infra,* pp. 77). The court held that the Commission could not base its disapproval of the tieing rule on the ground that the arrangement was anticompetitive and contrary to antitrust principles; that it had to find the agreement in conflict with one of the four specific criteria of Section 15. It further held that the Commission had not sufficiently explained the basis of its ultimate finding that the unanimity rule operated to "the detriment of the commerce of the United States" within the meaning of Section 15 of the Act. The court directed the Commission on remand either to make adequately supported ultimate findings to justify disapproval, or to approve the two clauses.

On remand (App. C, *infra,* pp. 78–127), the Commission made extensive findings, explained its rationale in detail and again disapproved both clauses. The Commission found the tieing clause seriously anticompetitive on three levels: it denied the conference-approved travel agents the opportunity to book passengers on non-conference lines; non-conference carriers were foreclosed from using the services of conference-approved agents; and the traveling public was denied the valuable service of such agents if it is wished to travel on a non-conference line. Finding no legitimate purpose for the rule, the Commission concluded that "it invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the regulatory statute" (App. C, *infra,* p. 110) and disapproved it as detrimental to the commerce of the

United States, unjustly discriminatory and contrary to the public interest.

The Commission found that the unanimity rule contributed to the disadvantage experienced by steamship lines in competing for transatlantic passengers with the airlines; that a substantial majority of conference members would have approved an increase in travel agents' commissions;[2] and that such an increase would have aided the steamship lines to increase their transatlantic traffic and to reduce the tendency of agents to promote airlines at the expense of ships. The Commission was also concerned that the unanimity requirement would deprive the conferences of a workable decision-making process that could respond effectively to changing economic conditions, and reasoned that the rule should not be approved without some demonstration—not forthcoming—by the conferences that the rule served a statutory objective or provided an important business advantage. The Commission concluded that higher commission rates would have made a significant difference in improving the economic situation of the steamships and that continuation of the obstructive unanimity requirement would be detrimental to the commerce of the United States and to the public interest.

On the second petition for review, the court of appeals again set aside the Commission's order, implying that the Commission had failed to comply with the

[2] The Commission pointed out that on at least one occasion a single conference member had blocked an increase in the maximum commission rate.

court's mandate by its failure to hold a further evidentiary hearing (App. D, *infra*, pp. 129–132). Without discussing the Commission's findings or legal rationale and without any further indication by the court of its view of the proper standards under Section 15, the court concluded that the Commission's decision "lacks sufficient basis in supporting facts or evidence of record and consists only of rationalizations, conjecture and opinion" (*id.*, p. 132). As a result, the court set aside the Commission's order as "arbitrary and capricious and not supported by substantial evidence on the record considered as a whole" (*ibid.*). The court refused to order another remand, entering instead a simple judgment of reversal (App. E, *infra*, p. 133).

REASONS FOR GRANTING THE WRIT

Section 15 of the Shipping Act requires common carriers by water to file with the Federal Maritime Commission any cooperative or restrictive agreements among them, and provides that the Commission shall disapprove any agreement that it finds, *inter alia*, "to operate to the detriment of the commerce of the United States, or to be contrary to the public interest." Once approved, such an agreement is exempt by the terms of Section 15 from the antitrust laws. In invalidating the Commission's disapproval under Section 15 of certain clauses in the conference agreements of the transatlantic passenger lines, the court of appeals drastically and unwarrantedly curtailed the power of the Commission to deal effectively with patently unfair and unnecessary restrictions. As

elaborated below, the court rejected a method of accommodation of antitrust and regulatory principles that is fully supported by sound policy and the teachings of this Court and has important applications in the administration of the Shipping Act and in other regulatory contexts.

1. One of the conference provisions in question, the so-called "tieing" rule, prohibits travel agents who are authorized to book travel on the conference lines from dealing with any competing non-conference line. Since 99 percent of the transatlantic passenger trade is carried by conference members, the principal effect of the rule is to deny the few transatlantic carriers who remain outside the conferences access to travel agents who handle conference business, and thus seriously to handicap them in competing for that trade.

A long course of group boycott cases in this Court has condemned out of hand practices similar to the proposed tieing clause because of their pernicious anticompetitive effects and general lack of redeeming economic justification. See, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127, 146–147; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5; *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457. The Commission's approach was that it would disapprove any agreement that so unjustifiably restrained competition, at least in the absence of a showing that it was necessitated by the particular needs of the shipping industry; and no such showing was made.

So ruling, the Commission was merely applying in a new context this Court's admonition that "Congress [in the Shipping Act] was unwilling to tolerate methods involving ties between conferences and shippers designed to stifle independent carrier competition." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 492. The legislative history of the Act also supports the Commission's interpretation. Congress' purpose was to "preserve ocean commerce while doing a minimum of violence to the well-established American antitrust concept * * *." H. Rep. No. 498, 87th Cong., 1st Sess., p. 2. To be sure, an exemption from the antitrust laws was provided for restrictive agreements approved by the Commission—not, however, because antitrust policy was deemed wholly inapplicable to the maritime area, but because some curtailment of competition might be necessary due to special conditions in the shipping industry. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–493; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220; *Report on The Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., pp. 394–396. Accordingly, the Commission was correct in holding that where a restraint appears on its face to serve only to eliminate competition it should be disapproved unless some compelling justification therefor is shown. There was no such showing here.

The court in its second opinion reversed the Commission's order on remand on the ground that it "lacks sufficient basis in supporting facts or evidence of record and consists only of rationalizations, con-

jecture and opinion" (App. D, *infra*, p. 132). But, given the pernicious character of the tieing rule and the absence of any showing that it "was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose" (App. C, *infra*, p. 107), the Commission was justified in resolving any deficiencies in the record against the conference members.

The case thus presents an important legal question. Where an agency is authorized to immunize a restrictive agreement from antitrust attack, may it—as the Commission holds—disapprove the agreement if on its face it is seriously anticompetitive and discloses no legitimate purpose (such as a group boycott, illegal *per se* under the antitrust laws) unless the cartel members establish a justification based on the special needs of the regulated industry? Or must the agency—as the court of appeals held—approve such an agreement in the absence of detailed affirmative evidence of its harms and of its lack of justification?

The importance of this question is obviously not limited to the tieing rule. Restrictive provisions are a commonplace feature of maritime agreements, and the Commission needs to know what standards it is entitled to follow in evaluating whether concerted action by the carriers goes beyond permissible limits. Nor is this a question pertinent only to the Shipping Act. It relates to every statute which authorizes an agency to immunize a restrictive agreement from the antitrust laws; and these are common. See, *e.g.*, Fed-

eral Aviation Act, § 414, 49 U.S.C. 1384; Interstate Commerce Act, §§ 5, 5a, 49 U.S.C. 5, 5b.

2. A different but closely related question is presented by the Commission's disapproval of the conference rule that require a unanimous vote of conference members before any change may be made in the ceiling on agents' commissions. Conference agreements commonly provide some procedure for making changes in the terms of the agreement: by unanimous vote, two-thirds vote or majority vote. See S. Rep. 860, 87th Cong., 1st Sess., p. 15. Here, the Commission held that a unanimity rule was detrimental to commerce and to the public interest because the ability of the conference members to compete with the airlines would be enhanced by eliminating the rule and, more generally, because it impaired the flexibility of the conferences in responding to changed circumstances by enabling any one of the 25 member lines [3] to prevent any change in a decision made many years before.[4] The conferences had failed to show any statutory purpose or important public benefit served by the rule.

Under familiar principles allocating functions between courts and agencies, the question of transporta-

[3] Indeed, the one carrier preventing the change may not even serve United States ports and thus may derive little if any of its business from travel agents in the United States.

[4] In contrast to a somewhat comparable unanimity rule in the airline industry, the rule here in question is not limited in duration to a reasonable period of time, at the end of which each member is free to act independently unless a new agreement is reached. Here, previously made rates remain frozen without limit as to time and can never be changed without unanimous action.

tion policy presented by the unanimity rule was one for the Commission to resolve. See, *e.g.*, *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536; *McLean Trucking Company* v. *United States*, 321 U.S. 67; cf. *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131. Having found that the rule, by reason of its rigidity, significantly harmed the industry and prevented effective competition to enlist the promotional assistance of travel agents, the Commission was, we submit, entitled to resolve remaining doubts against approval.

3. We allude to a final consideration, which, in our view, underscores the need and appropriateness of review by this Court in this case. When the case reached the court of appeals for the first time, the court set aside the Commission's action on the ground that the Commission had failed to connect its analysis of the evils of the questioned conference clauses with the criteria of disapproval specified in Section 15.[5] In an effort to comply with this mandate, the Com-

[5] It said that "there is no finding here that the tieing rule operates in any one of the four ways which Congress prescribed in 46 U.S.C. § 814 for disapproval" (App. B, *infra*, p. 77; see, also, *id.*, p. 75) and after noting that "[s]uch a finding is not for us to make" (*id.*, p. 77) remanded the case to the Commission with directions "that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U.S.C. § 814" (*ibid.*). The court followed the same analysis with respect to the Commission's disapproval of the unanimity rule (*id.*, pp. 70–74).

mission afforded all parties an opportunity to present additional briefs and oral argument. No party requested further evidentiary hearings and no additional evidence was taken. The Commission issued a detailed and comprehensive statement of its findings and reasoning, specifying the statutory criteria relied upon by it in concluding that disapproval was required. Yet, when the case returned to the court of appeals, the court again set aside the Commission's order. This time, its reason was "that nothing substantial has been added to support, sustain, or even justify the Commission's condemnation and voiding of the Conference actions" (App. D, *infra,* p. 132). The opinion does not indicate in what respect the court found the Commission's theory legally deficient, except to observe that the Commission had reached the same conclusions as in its first opinion without taking additional evidence (*id.,* p. 130). But the court's first opinion had not indicated that the Commission was expected to reopen the record.

When a court sets aside the action of an administrative agency, respect for the congressional scheme requires that it—no less than the agency (*United States* v. *Chicago, M., St. P. & P.R. Co.,* 294 U.S. 499, 511; *Securities & Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 94)—declare the basis of its action. We believe that the court's failure to articulate the grounds for its reversal on the second review, especially when its first opinion intimated disagreement merely with the

legal standards applied by the agency and its second found fault only with the agency's failure to take evidence, underscores the need for further review of the issues of this case.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] On its second review, the court, rather than remanding the case for further proceedings by the Commission in accordance with its mandate, reversed the Commission outright, terminating the proceeding. This procedure has been repeatedly condemned by this Court. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P.R. Co.*, 379 U.S. 642. This is an additional indication of the court's failure in this case to observe the proper limitations of judicial review of administrative action.

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